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**FILED**  
DISTRICT COURT OF GUAM

APR 10 2008 *mb*

JEANNE G. QUINATA  
Clerk of Court

Attorneys for the United States of America

8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF GUAM

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 vs.

13 IN HYUK KIM,

14 Defendant.

CRIMINAL CASE NO. 07-00064

UNITED STATES'  
[Proposed]  
JURY INSTRUCTIONS

16  
17 In addition to the Court's usual instructions, the Government hereby requests the Court to  
18 instruct the jury as set forth in the attached proposed jury instructions. In addition, an  
19 unnumbered set, without authorities, is submitted on computer diskette, in the event the Court  
20 wishes to submit instructions to the jury.

21 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of April, 2008.

22 LEONARDO M. RAPADAS  
23 United States Attorney  
24 Districts of Guam and NMI

25 BY:

*Karon V. Johnson*  
26 KARON V. JOHNSON  
27 Assistant U.S. Attorney  
28

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INSTRUCTION NO. 1

DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. And you must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return -- that is a matter entirely up to you.

AUTHORITY: Manual of Model Jury Instructions for the Ninth Circuit, 2003 Ed., § 3.1

INSTRUCTION NO. 2

CHARGE AGAINST DEFENDANT NOT EVIDENCE. PRESUMPTION  
OF INNOCENCE. BURDEN OF PROOF

The indictment in this case accuses the defendant of three charges, as follows. Count I of the indictment says that between January, 2005, and January 30, 2007, the defendant IN HYUK KIM unlawfully, willfully and knowingly combined, conspired, confederated and agreed with other persons to commit the offense of alien smuggling against the United States, in violation of Title 18, United States Codes, §§ 2 and 371. Counts II, III and IV of the indictment say that on or about April, 2005, in the District of Guam, the defendant IN HYUK KIM, knowing that an alien unlawfully remained in the United States, did unlawfully and knowingly conceal, harbor and shield from detection, and did attempt to conceal, harbor and shield from detection, certain named aliens, Youn Kyung OH, Hee Jeong JANG, and Yezu An JANZEN, for the purpose of commercial advantage and private financial gain, all in violation of Title 8, United States Code, §§ 1324(a)(1)(A)(iii) and (a)(1)(B)(i).

The indictment is not evidence. The defendant has not pleaded guilty to the charges. The defendant is presumed to innocent and does not have to testify of present any evidence to prove innocence. The government has the burden of proving every element of the charge beyond a reasonable doubt.

AUTHORITY: Manual of Model Jury Instructions for the  
Ninth Circuit, 2003 Ed., § 3.2, modified

1 INSTRUCTION NO. 3

2 REASONABLE DOUBT - DEFINED

3 Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the  
4 defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

5 A reasonable doubt is a doubt based upon reason and common sense and is not based  
6 purely on speculation. It may arise from a careful and impartial consideration of all the evidence,  
7 or from lack of evidence.

8 If after a careful and impartial consideration of all the evidence, you are not convinced  
9 beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not  
10 guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you  
11 are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the  
12 defendant guilty.

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25 AUTHORITY: Manual of Model Jury Instructions for the  
26 Ninth Circuit, 2003 Ed., § 3.5  
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INSTRUCTION NO. 4

CONSPIRACY

The defendant is charged in Count I of the indictment with conspiring to commit alien smuggling in violation of Section 371 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about January, 2005, and ending on or about January 30, 2007, there was an agreement between two or more persons to commit at least one crime as charged in the indictment;

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who

1 willfully joins an existing conspiracy is as responsible for it as the originators. On the other  
2 hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers  
3 some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a  
4 person does not become a conspirator merely by associating with one or more persons who are  
5 conspirators, nor merely by knowing that a conspiracy exists.

6 An overt act does not itself have to be unlawful. A lawful act may be an element of a  
7 conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not  
8 required to prove that the defendant personally did one of the overt acts.

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26 AUTHORITY: Manual of Model Jury Instructions for the  
27 Ninth Circuit, 2003 Ed., §8.16  
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INSTRUCTION NO. 5

ALIEN SMUGGLING

The defendant is charged in Counts II, III, and IV of the indictment with alien smuggling, in violation of Section 1324(a)(1)(A)(iii) of Title 8 of the United States Code. In order for each defendant to be found guilty of this count, the government must prove each of the following elements beyond a reasonable doubt:

First, that the named individual in each count was an alien;

Second, that this alien was not lawfully in the United States;

Third, the defendant knew or was in reckless disregard of the fact that this alien was not lawfully in the United States; and

Fourth, that defendant did unlawfully and knowingly conceal, harbor or shield from detection, or attempt to conceal, harbor or shield from detection, this alien, for the purpose of avoiding the alien's detection by immigration authorities.

An alien is a person who is not a natural-born or naturalized citizen or national of the United States.

AUTHORITY: Manual of Model Jury Instructions for the Ninth Circuit,  
2003 Ed., § 9.3.

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2 INSTRUCTION NO. 6

3 KNOWINGLY

4 An act is done knowingly if a defendant is aware of the act and does not act through  
5 ignorance, mistake or accident. The government is not required to prove that a defendant knew  
6 that his acts or omissions were unlawful. You may consider evidence of a defendant's words,  
7 acts or omissions, along with all the other evidence, in deciding whether a defendant acted  
8 knowingly.  
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25 AUTHORITY: Manual of Model Jury Instructions for the  
26 Ninth Circuit, 2003 Ed., § 5.6  
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1 INSTRUCTION NO. 7

2 AIDING AND ABETTING

3 A defendant may be found guilty of the crime charged, even if the defendant personally  
4 did not commit the act or acts constituting the crime but aided and abetted in its commission. To  
5 prove a defendant guilty of aiding and abetting, the government must prove beyond a reasonable  
6 doubt:

7 First: the crime of alien smuggling was committed by someone:

8 Second: the defendant knowingly and intentionally aided, counseled, commanded,  
9 induced or procured that person to commit each element of the crime; and

10 Third, the defendant acted before the crime was completed.

11 It is not enough that the defendant merely associated with the person committing the  
12 crime, or unknowingly or unintentionally did things that were helpful to that person, or was  
13 present at the scene of the crime.

14 The evidence must show beyond a reasonable doubt that the defendant acted with the  
15 knowledge and intention of helping that person commit alien smuggling.

16 The government is not required to prove precisely which defendant actually committed  
17 the crime and which defendant aided and abetted.

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25 AUTHORITY: Manual of Model Jury Instructions for the  
26 Ninth Circuit, 2003 Ed., § 5.1  
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INSTRUCTION NO. 8

ATTEMPT

The defendant is charged in the indictment with attempting to commit the crime of alien smuggling. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to commit the crime of alien smuggling; and

Second, the defendant did something which was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step.

AUTHORITY: Manual of Model Jury Instructions for the Ninth Circuit, 2003 Ed., § 5.3

INSTRUCTION NO. 9

DATES

The indictment charges that the crime occurred between certain dates. The Government does not have to prove that the crime happened on those exact dates. But the Government must prove that the crime occurred reasonably close to the dates alleged in the indictment.

AUTHORITY: United States v. Laykin, 886 F.2d 1534, 1543 (9<sup>th</sup> Cir. 1989)

INSTRUCTION NO. 10

WHAT IS EVIDENCE

The evidence from which you are to decide what the facts are consists of:

- (1) the sworn testimony of witnesses, both on direct and cross-examination,  
regardless of who called the witness;
- (2) the exhibits which have been received into evidence; and
- (3) any facts to which all the lawyers have agreed or stipulated.

AUTHORITY: Manual of Model Jury Instructions for the  
Ninth Circuit, 2003 Ed., § 3.6

INSTRUCTION NO. 11

WHAT IS NOT EVIDENCE

In reaching your verdict you may consider only the testimony and exhibits received into evidence. Certain things are not evidence and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses.

What they have said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition, some testimony and exhibits have been received only for a limited purpose; where I have given a limiting instruction, you must follow it.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

AUTHORITY: Manual of Model Jury Instructions for the Ninth Circuit, 2003 Ed., § 3.7

INSTRUCTION NO. 12

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

AUTHORITY: Manual of Model Jury Instructions for the Ninth Circuit, 2003 Ed., § 3.8

INSTRUCTION NO. 13

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness' testimony;
6. the reasonableness of the witness' testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

AUTHORITY: Manual of Model Jury Instructions for the Ninth Circuit, 2003 Ed., § 3.9

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2 INSTRUCTION NO. 14

3 DUTY TO DELIBERATE

4 When you retire, you should elect one member of the jury as your foreperson. That  
5 person will preside over the deliberations and speak for you here in court. You will then discuss  
6 the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty  
7 or not guilty, must be unanimous.

8 Each of you must decide the case for yourself, but you should do so only after you have  
9 considered all the evidence, discussed it fully with other jurors, and listened to the views of your  
10 fellow jurors.

11 Do not be afraid to change your opinion if the discussion persuades you that you should.  
12 But do not come to a decision simply because other jurors think it is right.

13 It is important that you attempt to reach a unanimous verdict but, of course, only if each  
14 of you can do so after having made your own conscientious decision. Do not change an honest  
15 belief about the weight and effect of the evidence simply to reach a verdict.

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25 AUTHORITY: Manual of Model Jury Instructions for the  
26 Ninth Circuit, 2003 Ed., § 7.1

INSTRUCTION NO. 15

VERDICT FORM

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it and advise the marshal or bailiff outside your door that you are ready to return to the courtroom.

AUTHORITY: Manual of Model Jury Instructions for the Ninth Circuit, 2003 Ed., § 7.5

INSTRUCTION NO. 16

COMMUNICATION WITH THE COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone -- including me -- how the jury stands, numerically or otherwise, on the question of the guilt of the defendant, until after you have reached a unanimous verdict or have been discharged.

AUTHORITY: Manual of Model Jury Instructions for the Ninth Circuit, 2003 Ed., § 7.6